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No. 84-1734

IN THE

# Supreme Court of the United States

October Term, 1984

KATHY JOHNSON,

*Petitioner,*

v.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD, individually and as President of the Pennsylvania State University, M. LEE UPCRAFT, individually and as Director of Residential Life Programs of the Pennsylvania State University,

*Respondents.*

## BRIEF IN RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

Did the Court of Appeals correctly determine that the demonstration and sale of cookware was commercial speech under the criteria of *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983)?

Did the Court of Appeals correctly apply *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, 447 U.S. 557 (1980) in holding that Penn State's policy of prohibiting group commercial sales demonstrations in an individual student's dormitory room did not violate the First Amendment?

## PARTIES TO THE PROCEEDING

The Respondents are The Pennsylvania State University ("Penn State"), John W. Oswald, the President of Penn State at the time the complaint was filed, and M. Lee Upcraft, Director of Residential Life Programs at Penn State.

Penn State is a nonprofit corporation existing under Pennsylvania laws governing nonprofit corporations. It has no parent, subsidiary or affiliate corporations.

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## BRIEF IN RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## COUNTERSTATEMENT OF THE CASE

The Pennsylvania State University ("Penn State") owns and operates residence halls occupied by approximately 13,000 students. Penn State has a policy which prohibits a student from using his or her residence hall room to solicit sales and to sell goods and services to others. The interests supporting Penn State's policy are accurately stated by the Court of Appeals. Penn State seeks to preserve its residence halls for their intended uses, and prevent them from

becoming "rent free merchandise marts" used by commercial vendors for the sale of merchandise. It also seeks to maintain an atmosphere conducive to study and other normal activities associated with student life. (Petition for Writ of Certiorari ("Petition") 20a; *American Future Systems, Inc. v. The Pennsylvania State University,* 752 F.2d 854, at 863 (3rd Cir. 1984).)

American Future Systems, Inc. ("AFS") is a corporation in the business of selling cookware, china, crystal and silverware. Its sales techniques are fully described in the Court of Appeals' opinion (Petition, 4a-6a, 752 F.2d at 856-57). AFS contacts a college student, usually a woman, and asks if she will host a demonstraiton in her residence hall room. If the student agrees, ten to fifteen other students are asked to attend. An AFS sales representative conducts a demonstration of AFS products and attempts to convince the students to sign credit purchase agreements for merchandise. Inducements such as a "free" vacation trip to Florida or Las Vegas are used to obtain a host for the sales demonstration and solicit attendees.

Under Penn State's policy, a student's residence hall room cannot be used for this purpose. Students, and companies such as AFS, do have ample alternative means of purchasing and selling goods and services. As the Court of Appeals pointed out, Penn State permits commercial vendors to conduct a one-on-one demonstration and sale in that student's room. Telephone and mail solicitations are permitted; advertising in the student newspaper and radio station is available; and commercial vendors can rent space from Penn State at the Nittany Lion Inn, an on-campus hotel, to do precisely what AFS does in its sales demonstrations. (Petition 27a, 752 F.2d at 867).

AFS and a group of student plaintiffs brought this ac-

tion in 1981, challenging Penn State's policy on First Amendment grounds. (In a prior action brought by AFS in 1977, principally involving the common areas of Penn State's residence halls, the Third Circuit Court of Appeals had previously upheld Penn State's policy. *American Future Systems, Inc. v. The Pennsylvania State University,* 618 F.2d 252 (3rd Cir. 1980)). The present litigation culminated in the decision of the Court of Appeals holding that Penn State's policy did not violate the First Amendment. It determined that the speech in question was commercial speech, based upon *Bolger v. Youngs Drug Products Co.,* 463 U.S. 60 (1983). It then applied the four-part test of *Central Hudson Gas & Electric Co. v. Public Service Commission of New York,* 447 U.S. 557 (1980), and concluded that the governmental interests asserted by Penn State were directly advanced by the regulation, and that the regulation was not excessive in light of the state's interest. (Petition, 24a-25a, 752 F.2d at 865-866).

AFS, although a plaintiff throughout the proceedings below, has not joined in the Petition for Writ of Certiorari. Petitioner Kathy Johnson was joined as a plaintiff after the trial, and is presently the only individual plaintiff who is a student at Penn State.

## ARGUMENT

### 1. The Court of Appeals' Decision is consistent with decisions of this Court.

The threshold determination of the Court of Appeals was the applicable level of First Amendment scrutiny because it recognized that "the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Bolger v. Youngs Drug Products Corp.,* 563 U.S. 60, at ____ (1983). In

*Bolger,* this Court identified three characteristics which, taken together, strongly supported the conclusion that the speech in question was commercial: the speech was concededly advertising, a specific product was referenced and the speaker had an economic motivation. 463 U.S. at ____, 103 S.Ct. at 2880.

The same three characteristics are present in an AFS demonstration. The content is advertising, specific products are described and AFS has an economic motive in making the presentation. On this basis the Court of Appeals properly concluded that the speech in question was commercial. Petitioner's claim that *Bolger* is distinguishable because the AFS demonstration is "invited" speech is incorrect both legally and factually. The *Bolger* analysis looked at the nature of the speech, not whether it was invited or uninvited. The facts here, moreover, plainly show that it is AFS which makes the initial contact to secure a host for the demonstration, followed by the solicitation of guests. The "invitation" comes only at the request of AFS. Nor does *Bolger* suggest, as the Petitioners do, that commercial speech is transformed into pure speech whenever the recipient listens for non-commercial reasons. Under the Petitioners' view, an advertisement for cookware could change from commercial to pure speech and back again depending solely upon what the recipient was thinking at the moment. This proposition would stand commercial speech analysis on its head.

The Court of Appeals then considered the validity of Penn States' policy under the test set forth in *Central Hudson Gas & Electric Co. v. Public Service Commission of New York,* 447 U.S. 557 (1980). It recognized that both the *Central Hudson* test for restrictions on commercial speech, and the test for speech on government-owned

property, had some applicability to Penn State's regulation. The test established for evaluating restrictions on government-owned property which, like a Penn State residence hall, is a non-public forum is whether the restriction is reasonable and not an effort to suppress expression on the basis of opposition to the speaker's views. *Perry Education Association v. Perry Local Educators Association,* 460 U.S. 37 (1983); *United States Postal Service v. Council of Greenburg,* 453 U.S. 114 (1981); *Green v. Spock,* 424 U.S. 828 (1976); *Adderly v. Florida,* 385 U.S. 39 (1966).

The Court of Appeals applied the more rigorous test of *Central Hudson* and found the restriction to be valid. First, the Court determined that the speech concerned lawful activity. It then concluded that Penn State's interest in preventing vendors from using Penn State residence halls as rent free merchandise marts, taken together with its interest in maintaining a residential atmosphere conducive to study, was substantial. In light of the number of students living in Penn State residence halls, the close quarters in which they reside and the vendors of innumerable products and services which would find this a tempting market, the Court found that the restriction directly furthered these interests. Finally, in considering the last prong of *Central Hudson* analysis, the Court noted that it must consider whether the restriction was necessary given the effect of allowing *all* commercial vendors access to student rooms on the same terms, not just whether the restriction was necessary with respect to AFS alone. It held that the regulation was not excessive, particularly in light of the ample alternative channels of communication.

As Judge Adam's concurring opinion points out, virtually any mode of analysis brings the same result,

whether it be the non-public forum test in *Perry,* the time, place and manner test of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976) or the tests applied to regulations in a school environment in such cases as *Tinker v. Des Moines Independent School District,* 393 U.S. 503 (1969). Further, Judge Sarokin's concurring opinion points out an alternative basis for the Court of Appeals' result. Because AFS demonstrations and sales involve deceptive speech and use of a credit policy found to discriminate on the basis of race and sex (*see, United States v. American Future Systems, Inc.,* 743 F.2d 169 (3rd Cir. 1984), the first prong of the *Central Hudson* analysis is not satisfied.

Petitioner's claim that the Court of Appeals misapplied *Central Hudson* is without merit. Contrary to Petitioner's assertion, the District Court made specific findings of fact as to the interests asserted by Penn State (Petition, p. 81a-83a, 94a, 95a, 553 F.Supp. 1268, at 1271, 1274, Nos. 26-38, No. 82). The District Court only differed with the Court of Appeals as to the legal significance of these interests. Nor did the Court of Appeals misinterpret the final prong of *Central Hudson* – that the regulation be no more extensive than necessary. The Court of Appeals applied this test in light of this Court's holding in *Clark v. Community for Creative Non-Violence,* ____ U.S. ____, 104 S.Ct. 3065 (1984), pointing out that its function was to determine whether Penn State's policy was an acceptable alternative among several, and not necessarily what the least restrictive type of regulation could be. Its conclusion was reinforced by the ample alternative channels available under Penn State's policy for the same communication.

Accordingly, the Court of Appeals' decision was entirely consistent with the decisions of this Court both with

respect to determining the nature of the speech and the validilty of the policy.

### 2. The Court of Appeals' Decision is limited in its effect.

No amount of rhetoric can expand the Court of Appeal's opinion beyond what it is on its face – a decision finding one policy at one University valid under the First Amendment. Its applicability to other colleges and universities would depend upon the terms of the specific policy, the nature of the forum and the activity sought to be conducted. All of these factors will vary, requiring lower courts to apply First Amendment principles to the specific facts of those cases. Therefore, this case does not present an issue of importance beyond its immediate effect upon the parties.

Penn State's residence hall policy does not by any means sweep as broadly as Petitioner now contends, and, in any event, the only aspect of the policy addressed by the Court of Appeals was its preclusion of group sales of cookware in students' rooms. The only fact as to the Petitioner, entered by stipulation, is that "she desired and continues to desire to host and/or attend the kind of demonstration conducted by Plaintiff American Future Systems, and which is precluded under University regulations." Whatever other aspects of the policy Petitioner now attacks, only the restriction on group commercial demonstrations was considered below.

## CONCLUSION

For the above reasons, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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